No. 84-713

In the Supreme Court of the United States

OCTOBER TERM, 1984

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

TWA SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioner challenges the Secretary of Labor's decision to provide some, rather than all, of the retroactive relief it seeks under the Service Contract Act of 1965 (Service Contract Act), 41 U.S.C. 351 *et seq.*

1. The Service Contract Act establishes minimum standards for the compensation of employees working under certain contracts to furnish services to the government (see generally 29 C.F.R. 4.103-4.105). Service contracts subject to the Act must contain a provision stating that the contractor will not pay his employees less than the wage established in a wage determination issued by the Secretary of Labor (see 41 U.S.C. 351). The Secretary's determination is based

upon the wages prevailing in the locality or, in some circumstances, the wages set in collective bargaining agreements (see 41 U.S.C. 351, 353(c), 358).

This case involves the application of the Service Contract Act to a concession agreement between respondent TWA Services, Inc. (TWAS) and respondent National Aeronautics and Space Administration (NASA) for the operation by TWAS of a Visitors' Information Center at the Kennedy Space Center (Pet. App. 2a). Under the agreement, TWAS provides bus tours, sells souvenirs, and maintains a cafeteria for visitors (*ibid.*). When TWAS began operating the Visitors' Center in 1968, responsibility for maintaining the permanent buildings and the roads and grounds surrounding the Visitors' Center was assigned to other service contractors (*id.* at 2a, 30a). In 1978, the concession agreement was modified to require TWAS to maintain the Visitors' Center buildings and grounds (*id.* at 2a-3a).[1]

Until the district court issued its decision in this case, NASA took the position that the concession agreement was exempt from the Service Contract Act (Pet. App. 3a-4a).[2] When the agreement was modified in 1978 to include the performance of the maintenance work, petitioner, which

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[1]TWAS assumed responsibility for road and ground maintenance from the prior contractor, Expedient Services, Inc., effective November 8, 1978. It took over the maintenance of the Visitors' Center buildings from Boeing Services, Inc., on January 1, 1979. Pet. App. 2a. No employees were transferred from these companies to TWAS, and these companies' work forces were not reduced as a result of the change in responsibility for this work (*id.* at 3a). TWAS hired new employees to perform the maintenance work (*ibid.*). Therefore, as the court below observed, "no individual was ever paid less money than he was being paid under any prior contractual arrangement" (*ibid.*).

[2]NASA based its view upon a Labor Department regulation exempting agreements relating to concessions in national parks. See Pet. App. 19a; see also page 4 note 4, *infra*.

represented the employees of one of the prior contractors, did not seek judicial review of NASA's position that the Service Contract Act did not apply to the concession agreement (*id.* at 14a).[3] On January 24, 1979, NASA issued a prospectus inviting proposals for a new ten-year concession agreement. The prospectus did not contain a wage determination under the Service Contract Act, and therefore indicated that NASA continued to view the concession agreement as exempt from the Act (*ibid.*). Petitioner did not seek judicial review of the statute's applicability to the agreement until August 20, 1979, after NASA had announced that TWAS had been awarded the new ten-year contract (*ibid.*).

In its complaint, petitioner asserted that NASA and the Department of Labor had violated the Act by failing to apply it to the concession agreement (Pet. App. 18a-19a). The district court held that the Service Contract Act did apply to the concession agreement (*id.* 18a-26a). NASA then requested a wage determination from the Department of Labor (*id.* at 31a), and the Department issued a determination retroactive to the date of the district court's decision (*ibid.*).

Petitioner then amended its complaint to request a wage determination retroactive to August 1978, the date that the previous concession agreement had been modified to include the maintenance responsibilities (Pet. App. 5a). The district court denied the requested relief (*id.* at 31a-37a), and the court of appeals affirmed (*id.* at 5a-14a). It held that neither NASA nor the Department of Labor had a mandatory duty to provide the relief sought by petitioner (*id.* at 11a-13a). In addition, the court concluded that as a result of

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[3]Petitioner presently represents all of the employees performing this maintenance work (Pet. App. 30a).

petitioner's failure to assert its claim in a timely manner, equitable considerations barred the retroactive relief (*id.* at 13a-14a). The court also held that petitioners could not recover these retroactive wages from TWAS because there is no private right of action under the Service Contract Act (*id.* at 6a-10a).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court therefore is not warranted.

Despite petitioner's efforts to create the appearance of a complex issue warranting resolution by this Court, the question presented in this case is quite narrow. The parties do not contest the district court's determination (Pet. App. 18a-26a) that the concession agreement is subject to the Service Contract Act.[4] Similarly, there is no dispute that the wage determination issued by the Secretary of Labor under the Act is retroactive to the date of the determination by the district court that the concession agreement is subject to the Act (Pet. App. 5a). The issue remaining is whether petitioner is entitled to relief retroactive to the November 1978 modification of the contract, either through the issuance of a writ of mandamus to the Secretary and NASA or in a private action against TWAS (*id.* at 5a-6a).[5]

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[4]Petitioner's arguments concerning this issue (Pet. 16-18) therefore are superfluous. For the same reason, there is no warrant for this Court to address petitioner's argument (Pet. 30) concerning the validity of 29 C.F.R. 4.133, the regulation exempting national park concession agreements from the Act. The regulation is not relevant in this case because it is not disputed that the agreement between NASA and TWAS is subject to the Act (see Pet. App. 14a n.10). In addition, the Department of Labor has made it clear that the current version of this regulation does not exempt contracts to provide visitor information services (see 48 Fed. Reg. 49753 (1983)).

[5]Since petitioner seeks no relief from the government on his private right of action theory, we do not address that issue in detail in this

Petitioner asserts (Pet. 21-23, 26-28) that it is entitled to a writ of mandamus compelling the Secretary of Labor and NASA to provide relief retroactive to November 1978. This argument was properly rejected by both of the courts below (Pet. App. 11-14a, 34a-37a) because neither the Secretary nor NASA has a mandatory duty to provide the relief sought by petitioner and because the equitable remedy of mandamus is not appropriate in the circumstances of this case.

Mandamus is available against a federal official only if the party seeking the relief shows that the official "owes him a clear non discretionary duty." *Heckler* v. *Ringer,* No. 82-1772 (May 14, 1984), slip op. 13; see also *Kerr* v. *United States District Court,* 426 U.S. 394, 402-403 (1976); *United States ex rel. Girard Trust Co.* v. *Helvering,* 301 U.S. 540, 543 (1937). Petitioner cannot satisfy this standard because the Secretary of Labor is invested with broad discretion in administering the Service Contract Act. He is authorized to "make rules and regulations, issue orders, make decisions, and take other *appropriate* action under the Act." 29 C.F.R. 4.102 (emphasis added); see also 41 U.S.C. 38 and 39.[6] The regulations in effect at the time the Secretary made his determination regarding retroactive relief contained no requirement that such relief be granted. They stated only that the contracting agency should include in the contract

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memorandum. In our view, the court below correctly decided that there is no private right of action under this statute (see Pet. App. 6a-10a). We note that this decision is in accord with the decisions of the other courts of appeals that have addressed this question. See *Miscellaneous Service Workers* v. *Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981); *International Association of Machinists* v. *Hodgson,* 515 F.2d 373 (D.C. Cir. 1975).

[6]These provisions are made applicable to the Service Contract Act by 41 U.S.C. 353(a).

"any wage determinations communicated to it" after a finding by the Department of Labor that the provisions required by the Act were improperly omitted from the contract (29 C.F.R. 4.5(c) (1983)). NASA complied with this rule by ensuring that TWAS would pay wages in accordance with the Secretary's determination.

The present regulation makes clear that retroactive relief is discretionary. It states that the Department of Labor "*may* require retroactive application of [a] wage determination" where the contracting agency erroneously determined that the Service Contract Act did not apply to the agreement (29 C.F.R. 4.5(c)(2) (emphasis added)). In explaining this rule, the Department of Labor stated (46 Fed. Reg. 4306, 4323 (1981)):

> In the case of a substantially completed contract, the Department of Labor has and will consider whether a contracting agency made a good faith decision not to include the required provisions of the Act in a particular contract and the possible disruptions to a procurement in deciding on remedies in each individual case.

Thus, the Secretary plainly has discretion to balance a number of factors in selecting the relief appropriate in each case.[7] That is precisely what the Secretary did in this case. Since there is "no statutory [or regulatory] * * * language which supports [petitioner's] demand for such unilateral

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[7]Petitioner's contrary view (Pet. 8-9) is based upon regulations that never became effective (see 48 Fed. Reg. 49736 (1983)), and regulations that are completely unrelated to this issue (*e.g.*, 29 C.F.R. 4.6 (clauses to be included in service contracts)). His conclusion (Pet. 18-19) that the Secretary and the court below disregarded the applicable regulations therefore is incorrect.

retroactive relief" (Pet. App. 13a), petitioner is not entitled to a writ of mandamus.[8]

In addition, as both of the courts below found, the issuance of a writ of mandamus in this case is barred by equitable considerations (Pet. App. 13a-14a, 35a-36a). There is no warrant for review of this determination by this Court. See *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

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[8]Petitioner's reliance (Pet. 21-23) upon this Court's decision in *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), is misplaced. In that case, the Court invalidated a regulation issued under the Fair Labor Standards Act and directed the agency to promulgate a new regulation that then could be applied retroactively (322 U.S. at 620-622). The Court emphasized that "[t]he district court would not be telling the Administrator how to exercise his discretion but would merely require him to exercise it. It is a remedy against inaction." 322 U.S. at 622-623. *Addison* provides no authority for petitioner's claim for retroactive relief under this different statutory scheme. The Secretary has exercised his discretion regarding the appropriate relief, and *Addison* recognizes that such an exercise of discretion should not be overturned. See also Pet. App. 12a-13a. The other decision relied upon by petitioner — *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978) — concerns the Equal Pay Act and is completely unrelated to any issue in this case.

Similarly, Section 4(c) of the Act, 41 U.S.C. 353(c), which is repeatedly cited by petitioner, does not support his claim that the Secretary had a mandatory duty to order relief retroactive to August 1978. This section of the statute provides that in certain circumstances a contractor must pay the same wages as his predecessor if the predecessor's employees were paid under a collective bargaining agreement. Since the provision contains no indication that it was intended to supplant the Secretary's discretion to formulate retroactive remedies where the contracting agency incorrectly concluded that the contract was exempt from the Act, it cannot be the source of a mandatory duty to provide the relief sought by petitioner. The Court therefore need not address petitioner's erroneous assertion (Pet. 31-32) that despite the plain language of 41 U.S.C. 353(c) referring to "collective-bargaining agreement[s]," the provision applies even if the previous contractor's employees were not represented by a union.

Mandamus relief, like any form of equitable relief, is discretionary, and its availability is governed by equitable considerations. See *e.g., Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366, 373 (1955); *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. at 543-544. Here, petitioner delayed filing suit for almost a year after it had learned that NASA considered the concession agreement exempt from the Service Contract Act (see pages 2-3, *supra*), with the result that TWAS — the party that would bear the financial burden of the additional retroactive relief — bid on and won a new contract based on NASA's determination that the contract was not subject to the Service Contract Act. Thus, TWAS was severely disadvantaged by petitioner's failure to press its claim prior to the award of the new contract.

Petitioner argues (Pet. 27-28) that because TWAS knew there was a dispute over the status of the concession agreement under the Act it should not have relied upon NASA's determination. This argument ignores TWAS' practical dilemma. If TWAS had based its bid on the view that the new contract was subject to the Act, and made an offer that reflected higher wage costs and therefore was less favorable to NASA, a competing firm could have won the contract with a bid based upon the assumption that the contract was not subject to the Act. TWAS joined with petitioner in an effort to obtain a wage determination for the new contract under the Act, but this joint effort failed (Pet. App. 14a). TWAS had to bid on the assumption that the contract was not covered by the Act. As the court below concluded, "[i]n view of these circumstances it would be manifestly inequitable for [petitioner], at this late date, to shift the blame to TWAS and penalize it for [petitioner's] lethargy in pursuing the coverage issue" (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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